

SENATE BILL No. 435

DIGEST OF INTRODUCED BILL

Citations Affected: IC 23-2.

Synopsis: Securities commissioner. Provides the procedure for the securities commissioner to obtain the assistance of county prosecutors and the attorney general for enforcement actions. Removes the commissioner from the conduct of hearings by requiring the appointment of hearing officers. Allows the commissioner to enter orders of rescission, restitution, and disgorgement, including interest at the rate of 8%, to loan brokers.

Effective: July 1, 2003.

Clark

January 21, 2003, read first time and referred to Committee on Criminal, Civil and Public Policy.

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First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

SENATE BILL No. 435

A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 23-2-1-15 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 15. (a) This chapter
3 shall be administered by a division of the office of the secretary of
4 state. The secretary of state shall appoint a securities commissioner
5 who shall be responsible for the direction and supervision of the
6 division and the administration of this chapter under the direction and
7 control of the secretary of state. The salary of the securities
8 commissioner shall be paid out of the funds appropriated for the
9 administration of this chapter. The commissioner shall serve at the will
10 of the secretary of state.
11 (b) The secretary of state:
12 (1) shall employ a chief deputy, a senior investigator, a senior
13 accountant, and other deputies, investigators, accountants, clerks,
14 stenographers, and other employees necessary for the
15 administration of this chapter; and
16 (2) shall fix their compensation with the approval of the budget
17 agency.



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1 The chief deputy, other deputies, the senior investigator, and the senior
2 accountant, once employed under this chapter, may be dismissed only
3 for cause by the secretary of state upon ten (10) days notice in writing
4 stating the reasons for dismissal. Within fifteen (15) days after
5 dismissal, the chief deputy, other deputies, the senior investigator, and
6 the senior accountant may appeal to the state personnel board. The
7 state personnel board shall hold a hearing, and if it finds that the
8 appealing party was dismissed for a political, social, religious, or racial
9 reason, the appealing party shall be reinstated to the appealing party's
10 position without loss of pay. In all other cases, if the decision is
11 favorable to the appealing party, the secretary of state shall follow the
12 findings and recommendations of the board, which may include
13 reinstatement and payment of salary or wages lost. The hearing and any
14 subsequent proceedings or appeals shall be governed by the provisions
15 of IC 4-15-2 and IC 4-21.5.

16 (c) Fees and funds of whatever character accruing from the
17 administration of this chapter shall be accounted for by the secretary of
18 state and shall be deposited with the treasurer of state to be deposited
19 by the treasurer of state in the general fund of the state. Expenses
20 incurred in the administration of this chapter shall be paid from the
21 general fund upon appropriation being made for the expenses in the
22 manner provided by law for the making of those appropriations.
23 However, costs of investigations recovered under sections 16(d) and
24 17.1(c) of this chapter shall be deposited with the treasurer of state to
25 be deposited by the treasurer of state in a separate account to be known
26 as the securities division enforcement account. The funds in the
27 account shall be available, with the approval of the budget agency, to
28 augment and supplement the funds appropriated for the administration
29 of this chapter. The funds in the account do not revert to the general
30 fund at the end of any fiscal year.

31 (d) In connection with the administration and enforcement of the
32 provisions of this chapter, the attorney general shall render all
33 necessary assistance to the securities commissioner upon the
34 commissioner's request, and to that end, the attorney general shall
35 employ legal and other professional services as are necessary to
36 adequately and fully perform the service under the direction of the
37 securities commissioner as the demands of the securities division shall
38 require. Expenses incurred by the attorney general for the purposes
39 stated in this subsection shall be chargeable against and paid out of
40 funds appropriated to the attorney general for the administration of the
41 attorney general's office.

42 (e) Neither the secretary of state, the securities commissioner, nor



an employee of the securities division shall be liable in their individual capacity, except to the state, for an act done or omitted in connection with the performance of their respective duties under this chapter.

(f) The commissioner, subject to the approval of the secretary of state, may adopt rules, orders, and forms necessary to carry out this chapter, including rules and forms concerning registration statements, applications, reports, and the definitions of any terms if the definitions are consistent with this chapter. The commissioner may by rule or order allow for exemptions from registration requirements under sections 3 and 8 of this chapter if the exemptions are consistent with the public interest and this chapter.

(g) The provisions of this chapter delegating and granting power to the secretary of state, the securities division, and the securities commissioner shall be liberally construed to the end that:

(1) the practice or commission of fraud may be prohibited and prevented;

(2) disclosure of sufficient and reliable information in order to afford reasonable opportunity for the exercise of independent judgment of the persons involved may be assured; and

(3) the qualifications may be prescribed to assure availability of reliable broker-dealers, investment advisers, and agents engaged in and in connection with the issuance, barter, sale, purchase, transfer, or disposition of securities in this state.

It is the intent and purpose of this chapter to delegate and grant to and vest in the secretary of state, the securities division, and the securities commissioner full and complete power to carry into effect and accomplish the purpose of this chapter and to charge them with full and complete responsibility for its effective administration.

(h) It is the duty of a prosecuting attorney, as well as of the attorney general, to assist the securities commissioner upon the commissioner's request in the prosecution to final judgment of a violation of the penal provisions of this chapter and in a civil proceeding or action arising under this chapter. ~~If evidence concerning violations of this chapter or a rule or order under this chapter is referred to a prosecuting attorney; the prosecuting attorney shall within ninety (90) days file with the securities commissioner a written statement concerning an action taken or; if no action has been taken, the reasons no action has been taken. If the commissioner determines that an action based on the securities division's investigations is meritorious:~~

(1) the commissioner or a designee empowered by the commissioner shall certify the facts drawn from the investigation to the prosecuting attorney of the judicial circuit

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1 in which the crime may have been committed;

2 (2) the commissioner and the securities division shall assist the
3 prosecuting attorney in prosecuting an action under this
4 section;

5 (3) a prosecuting attorney to whom facts concerning fraud are
6 certified under subdivision (1) may refer the matter to the
7 attorney general; and

8 (4) if a matter has been referred to the attorney general under
9 subdivision (3), the attorney general may:

10 (A) file an information in a court with jurisdiction over the
11 matter in the county in which the offense is alleged to have
12 been committed; and

13 (B) prosecute the alleged offense.

14 (i) The securities commissioner shall take, prescribe, and file the
15 oath of office prescribed by law. The securities commissioner, senior
16 investigator, and each deputy are police officers of the state and shall
17 have all the powers and duties of police officers in making arrests for
18 violations of this chapter, or in serving any process, notice, or order
19 connected with the enforcement of this chapter by whatever officer or
20 authority or court issued. The securities commissioner, the deputy
21 commissioners for enforcement, and the investigators comprise the
22 enforcement department of the division and are considered a criminal
23 justice agency for purposes of IC 5-2-4 and IC 5-2-5.

24 (j) The securities commissioner and each employee of the securities
25 division shall be reimbursed for necessary hotel and travel expenses
26 when required to travel on official duty. Hotel and travel
27 reimbursements shall be paid in accordance with the travel regulations
28 prescribed by the budget agency.

29 (k) It is unlawful for the secretary of state, the securities
30 commissioner, or the securities division's employees to use for personal
31 benefit information that is filed with or obtained by the securities
32 division and that is not made public. No provision of this chapter
33 authorizes the secretary of state, the securities commissioner, or the
34 employees of the securities division to disclose information except
35 among themselves, or when necessary or appropriate, in a proceeding
36 or investigation under this chapter. No provision of this chapter either
37 creates or derogates from a privilege that exists at common law or
38 otherwise when documentary or other evidence is sought under a
39 subpoena directed to the secretary of state, the securities commissioner,
40 or the securities division or its employees.

41 (l) The commissioner may honor requests from interested persons
42 for interpretative opinions and from interested persons for

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determinations that the commissioner will not institute enforcement proceedings against specified persons for specified activities. A determination not to institute enforcement proceedings must be consistent with this chapter. The commissioner shall charge a fee of one hundred dollars (\$100) for an interpretative opinion or determination.

SECTION 2. IC 23-2-1-16 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 16. (a) With the filing of any application for registration pursuant to this chapter, there shall be filed the irrevocable written consent of the applicant that suits and actions growing out of the violation of any provision or provisions of this chapter may be commenced against the applicant in the proper courts of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state upon the secretary of state. The consent must stipulate and agree that service of process or pleadings on the secretary of state shall be taken and held in all courts to be as valid and binding as if due service has been made upon the applicant. The written consent shall be authenticated by:

(1) the seal of the applicant if the applicant has a seal; and

(2) the acknowledged signature of:

(A) the members of the partnership, or the depositors, managers, or committee;

(B) any officers of the corporation, or of the incorporated or unincorporated association if the applicant be an incorporated or unincorporated association, duly authorized by resolution of the board of directors, trustees, or managers of the corporation or association, and accompanied by a duly certified copy of the resolution of the board of directors, trustees, or managers of the corporation or association authorizing the officers to execute the same; or

(C) any members or managers of the limited liability company, duly authorized by the members and managers of the limited liability company and accompanied by a duly certified copy of the resolution of the members or managers of the limited liability company which authorizes the members or managers to execute the same.

(b) The engaging in this state by a nonresident broker-dealer, investment advisor, agent, issuer, offeror, or seller, in any transaction, or the doing of any business in this state involving a sale of securities, or an offer to sell securities, shall be deemed equivalent to an appointment by the nonresident broker-dealer, investment advisor,

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1 agent, issuer, offeror, or seller, of the secretary of state, or his successor
2 in office, to be his true and lawful attorney upon whom may be served
3 any lawful process, writ, notice, or order, in any action or proceeding
4 against such nonresident broker-dealer, investment advisor, agent,
5 issuer, offeror, or seller, arising or growing out of any transaction, or of
6 the doing of any business involving a sale of securities, or offer to sell
7 securities in this state. The engaging in any such transaction, or the
8 doing of any such business in this state, shall be signification of the
9 agreement of such nonresident broker-dealer, investment advisor,
10 agent, issuer, offeror, or seller, that any process, writ, notice, or order
11 against him which is so served shall be of the same legal force and
12 effect as if served upon such nonresident broker-dealer, investment
13 advisor, agent, issuer, offeror, or seller personally. Any action or
14 proceeding against a nonresident broker-dealer, agent, issuer, offeror,
15 or seller, may be instituted or commenced in the proper court of any
16 county in this state in which the nonresident broker-dealer, investment
17 advisor, agent, issuer, offeror, or seller, shall have engaged in any
18 transaction or shall have done any business in this state involving a sale
19 of securities, or an offer to sell securities, or in the county in which the
20 person bringing the action may reside.

21 (c) The service of any process, writ, notice, or order against an
22 applicant not domiciled in this state, or against a nonresident
23 broker-dealer, investment advisor, agent, issuer, offeror, or seller, shall
24 be made by leaving duplicate copies thereof with a fee of two dollars
25 (\$2) with the secretary of state, or in his office, and the service shall be
26 deemed sufficient service, if the notice of service and a copy of the
27 process, writ, notice, or order are forthwith sent by registered mail with
28 return receipt requested, addressed to the person so served at the
29 address disclosed upon any such written consent that may have been
30 filed in the office of the secretary of state, or as disclosed upon any
31 written notification of address filed by the person to be served, or if no
32 address is filed in the office of the secretary of state then at any other
33 address, if any, known or disclosed to the secretary of state. Upon
34 return of the return receipt showing delivery and the acceptance of the
35 registered mail, or upon the return of the registered mail showing a
36 refusal of the acceptance, the secretary of state shall attach either the
37 return receipt or the refused mail to the copy of the process, writ,
38 notice, or order retained by him, and mail the same to the clerk of the
39 court in which the action or proceeding is pending in respect to which
40 the process, writ, notice, or order was issued, or the secretary of state
41 shall return the copy of the process, writ, notice, or order to the clerk
42 with the advice, if such be the case, that no address to which the

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process, writ, notice, or order may be mailed is known to the secretary of state. The clerk of the court shall thereupon file the same, and the same shall be deemed a part of the record in the action or proceeding without a special bill of exceptions therefor. Refusal of any person to accept delivery of the registered mail provided in this section, or the refusal to sign the return receipt, or the ignorance of the secretary of state of any address to which process, writ, notice, or order may have been mailed, shall not in any manner affect the legality or effect of service, and the person shall be presumed to have had knowledge of the contents of any process, writ, notice, or order contained therein, or issued in connection with any proceeding resulting from the transaction in which the person may have participated in this state. No process, writ, notice, or order served in this section provided shall be returnable in less than twenty (20) days from the date the same shall have been issued.

(d) The securities division is authorized to make investigations and examinations:

(1) in connection with any application for registration of any security, broker-dealer, investment advisor, or agent, or any registration thereof already granted; or

(2) whenever it appears to the commissioner upon the basis of a complaint or information that reasonable grounds exist for the belief that an investigation or examination is necessary or advisable for the more complete protection of the interests of the public.

On investigations and examinations made by the commissioner or an employee of the securities division, all reasonable expenses, including, but not limited to, a per diem prorated upon the salary of such commissioner or employee together with the actual traveling and hotel expenses, may be charged as costs of the investigation or examination to be paid by the party or parties under investigation or examination. Before a hearing on the matter under investigation, the commissioner may require the posting of a bond in the penal sum of five hundred dollars (\$500), or in such other additional amount as may be required to guarantee the payment of the costs of the investigation and hearing, to the state of Indiana with sufficient surety to be approved by the commissioner.

(e) The secretary of state or the commissioner shall have the power to sign all orders, official certifications, documents, or papers, under any of the provisions of this chapter. The commissioner **must appoint hearing officers, who** shall have the power to:

(1) hold and conduct hearings ~~before the commissioner or~~



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1 authorize the same to be held before any other representative of
 2 the securities division in any county in the state of Indiana;

3 (2) hear evidence;

4 (3) conduct inquiries with or without hearings;

5 (4) receive reports of investigators or other officers or employees
 6 of the state of Indiana, or of any municipal corporation within the
 7 state or governmental subdivision;

8 (5) administer oaths, or cause them to be administered;

9 (6) subpoena witnesses, and compel them to attend and testify;
 10 and

11 (7) to compel the production of books, records, and other
 12 documents.

13 (f) Upon:

14 (1) disobedience on the part of any person to any lawful subpoena
 15 issued under authority of this chapter, or to any lawful order or
 16 demand requiring the production of any books, accounts, papers,
 17 records, documents, or other evidence or information as provided
 18 in this chapter; or

19 (2) the refusal of any witness to appear when subpoenaed, or to
 20 testify to any matter regarding which he may be lawfully
 21 interrogated, or to take or subscribe to any oath required by this
 22 chapter;

23 it shall be the duty of the circuit or superior court of the county in
 24 which the hearing or inquiry or investigation in question is being or is
 25 to be held, where demand is made, or where said production is ordered
 26 to be made, upon written petition of ~~the~~ **a hearing officer appointed**
 27 **by the** commissioner, to compel obedience to the lawful requirements
 28 of the subpoena, order, or demand, to compel the production of the
 29 necessary or required books, papers, records, documents, and other
 30 evidence and information, to compel any witness to attend in any
 31 county within this state and to testify to any matter regarding which he
 32 may lawfully be interrogated, and to take or subscribe to any oath
 33 required, and, upon the failure, refusal, or neglect of any person to
 34 comply with any order of any court or judge thereof, as provided in this
 35 section, such person shall be punished for contempt of court.

36 (g) If a witness, in any hearing, inquiry, or investigation conducted
 37 under this chapter, refuses to answer any question or produce any item,
 38 ~~the~~ **a hearing officer appointed by the** commissioner may file a
 39 written petition with the circuit or superior court in the county where
 40 the hearing, investigation, or inquiry in question is being conducted
 41 requesting a hearing on the refusal. The court shall hold a hearing to
 42 determine if the witness may refuse to answer the question or produce

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the item. If the court determines that the witness, based upon his privilege against self-incrimination, may properly refuse to answer or produce an item, the **hearing officer appointed by the** commissioner may make a written request that the court grant use immunity to the witness. Upon written request of the **hearing officer appointed by the** commissioner, the court shall grant use immunity to a witness. The court shall instruct the witness, by written order or in open court, that:

- (1) any evidence the witness gives, or evidence derived from that evidence, may not be used in any criminal proceedings against that witness, unless the evidence is volunteered by the witness or is not responsive to a question; and
- (2) the witness must answer the questions asked and produce the items requested.

A grant of use immunity does not prohibit the use of evidence that the witness gives in a hearing, investigation, or inquiry from being used in a prosecution for perjury under IC 35-44-2-1. If a witness refuses to give the evidence after ~~he~~ **the witness** has been granted use immunity, the court may find ~~him~~ **the witness** in contempt.

(h) Upon order of ~~the~~ **a hearing officer appointed by the** commissioner ~~or his representative~~ in any hearing, depositions may be taken of any witness residing within or without the state. The depositions shall be taken in the manner prescribed by law for depositions in civil actions and made returnable to ~~the~~ **a hearing officer appointed by the** commissioner. ~~or his representative.~~

(i) Each witness who shall appear before ~~the~~ **a hearing officer appointed by the** commissioner ~~or his representative~~ by order shall receive for ~~his~~ **their** attendance the fees and mileage provided for witnesses in civil cases, which shall be audited and paid by the state in the same manner as other expenses of the securities division are audited and paid upon the presentation of proper vouchers sworn to by the witnesses and approved by the commissioner. However, no witnesses subpoenaed at the instance of parties other than ~~the~~ **a hearing officer appointed by the** commissioner ~~or his representative~~ shall be entitled to any fee or compensation from the state.

(j) It is not necessary to negative any of the exemptions or classifications in this chapter provided in any complaint, information, indictment, or any other writ or proceedings laid or brought under this chapter, and the burden of proof of any exemption or classification shall be upon the party claiming the benefits of the exemption or classification.

(k) In any prosecution, action, suit, or proceeding based upon or arising out of or under the provisions of this chapter, a certificate duly

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signed by the commissioner showing compliance or noncompliance with the provisions of this chapter respecting the security in question or respecting compliance or noncompliance with the provisions of this chapter, by any issuer, broker-dealer, investment advisor, or agent, shall constitute ~~prima facia~~ **facie** evidence of compliance or noncompliance with the provisions of this chapter, as the case may be, and shall be admissible in evidence in any action at law or in equity to enforce the provisions of this chapter.

(l) Copies of any statement and documents filed in the office of the secretary of state and of any records of the secretary of state certified to by the commissioner or any deputy shall be admissible in any prosecution, action, suit, or proceeding based upon, or arising out of, or under the provisions of this chapter to the same effect as the original of such statement, document, or record would be if actually produced.

(m) Whenever, under the provisions of this chapter, any person is entitled to receive notice or required to be served with notice in any proceeding instituted by the commissioner pursuant to the provisions of this chapter, notice shall be deemed sufficient:

(1) if sent by registered mail with return receipt requested to that person or ~~his~~ **the person's** designated attorney or agent for service of process at:

(A) ~~his~~ **the person's** last known residence;

(B) ~~his~~ **the person's** last known place of business; or

(C) the last known address at which ~~he~~ **the person** purports to receive mail;

(2) if personally delivered and left with a person of suitable age or in a conspicuous place at:

(A) ~~his~~ **the person's** last known residence;

(B) ~~his~~ **the person's** last known place of business; or

(C) the last known address at which ~~he~~ **the person** purports to receive mail; or

(3) by personal service on the person.

SECTION 3. IC 23-2-5-10, AS AMENDED BY P.L.14-2000, SECTION 53, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 10. (a) **Whenever it appears to the commissioner that a person has engaged in or is about to engage in an act or a practice constituting a violation of this chapter or a rule or an order under this chapter, the commissioner may investigate and may issue, with or without a prior hearing, orders and notices as the commissioner determines to be in the public interest, including cease and desist orders, orders to show cause, and notices. After notice and hearing, the commissioner may enter an**

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1 order of rescission, restitution, or disgorgement, including interest
 2 at the rate of eight percent (8%) per year, directed to a person who
 3 has violated this chapter or a rule or order under this chapter.

4 (b) Upon the issuance of an order or notice by the commissioner
 5 under subsection (a), the commissioner shall promptly notify the
 6 respondent:

- 7 (1) that the order or notice has been issued;
- 8 (2) of the reasons the order or notice has been issued; and
- 9 (3) that upon the receipt of a written request the matter will
 10 be set down for a hearing to commence within forty-five (45)
 11 business days after receipt of the request unless the
 12 respondent consents to a later date.

13 If a hearing is not requested and not ordered by the commissioner,
 14 an order remains in effect until it is modified or vacated by the
 15 commissioner. If a hearing is requested or ordered, the
 16 commissioner, after notice of an opportunity for hearing, may
 17 modify or vacate the order or extend it until final determination.

18 (c) The commissioner may deny, suspend, or revoke the license of
 19 a licensee or the registration of a registrant if the licensee or the
 20 registrant:

- 21 (1) fails to maintain the bond required under section 5 of this
 22 chapter;
- 23 (2) is insolvent;
- 24 (3) has violated any provision of this chapter;
- 25 (4) has knowingly filed with the commissioner any document or
 26 statement containing any false representation of a material fact or
 27 omitting to state a material fact or if a representation becomes
 28 false after the filing but during the term of a license or certificate
 29 of registration as provided in subsection ~~(e)~~; (g); or
- 30 (5) has been convicted, within ten (10) years before the date of the
 31 application, renewal, or review, of any crime involving fraud or
 32 deceit.

33 ~~(b)~~ (d) The commissioner may not enter a final order denying,
 34 suspending, or revoking the license of a licensee or the registration of
 35 a registrant without prior notice to all interested parties, opportunity for
 36 a hearing, and written findings of fact and conclusions of law.
 37 However, the commissioner may by summary order deny, suspend, or
 38 revoke a license or certificate of registration pending final
 39 determination of any proceeding under this section. Upon the entry of
 40 a summary order, the commissioner shall promptly notify all interested
 41 parties that it has been entered, of the reasons for the summary order,
 42 and that upon receipt by the commissioner of a written request from a

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party, the matter will be set for hearing to commence within fifteen (15) business days after receipt of the request. If no hearing is requested and none is ordered by the commissioner, the order remains in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of the hearing has been given to all interested persons and the hearing has been held, may modify or vacate the order or extend it until final determination.

~~(e)~~ (e) IC 4-21.5 does not apply to a proceeding under this section.

~~(d)~~ (f) If:

(1) a licensee desires to have a previously unregistered employee begin engaging in origination activities; or

(2) an individual who was previously registered under this chapter is employed by another licensee who desires to have the registrant engage in origination activities;

the employer licensee shall, within fifteen (15) days after the employee first conducts origination activities, submit to the commissioner, on a form prescribed by the commissioner, notice of the registrant's employment. If the employee has not previously been registered, the licensee shall submit evidence that the employee has completed the education requirements of section 21 of this chapter.

~~(e)~~ (g) If a material fact or statement included in an application under this chapter changes after the application has been submitted, the applicant shall provide written notice to the commissioner of the change. The commissioner may revoke or refuse to renew the license or registration of any person who:

(1) is required to submit a written notice under this subsection and fails to provide the required notice within two (2) business days after the person discovers or should have discovered the change; or

(2) would not qualify for licensure or registration under this chapter as a result of a change in material fact or statement.

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